



Supreme Court of the United States

OCTOBER TERM, 1943.

No.

ARTHUR H. STOIKE,
Petitioner-Respondent Below,

—against—

FIRST NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant Below.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the Supreme Court, Appellate Division, First Department, granting judgment to the plaintiff is found on pages 33 to 39, folios 97 to 117, of the record. It is reported in 264 App. Div. 585. The opinion of the Court of Appeals is found at page 51 of the record, and has not been officially reported at the time of the preparation of this brief.

Jurisdiction and Statement of the Case.

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

Specification of Errors.

1. The Court of Appeals of the State of New York erred in holding that the "cleaning operations which plaintiff was required to perform in defendant's banking quarters were not so closely related to the many banking services performed there" as to be a part of such banking services so that "plaintiff was 'engaged in' interstate commerce."
2. The Court of Appeals of the State of New York erred in reversing the judgment for the plaintiff for overtime pay and in directing judgment for the defendant.
3. The Court of Appeals of the State of New York erred in holding that the defendant was in no wise engaged in the production of goods for commerce.

Argument.

POINT I.

Defendant, First National Bank of the City of New York, is engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

A. Banking Is a Commercial Activity and Banks Are Engaged in Commerce.

The modern commercial bank is a direct descendant of the artisan in gold and silver who bought and sold specie as a commodity. In the course of time the worker in the precious metals acted as a depository for such metals in behalf of their owners; undertook the trans-

port of such metals; and from that point evolved something akin to our modern banking. Throughout the history, the banker has been a leader in and an integral part of commerce. Instead of buyers and sellers of precious metals and a reservoir from which those precious metals could be borrowed, banks have become buyers and sellers of credits and reservoirs of such credits from which credit could be borrowed. The commodity which banks have dealt in has not changed:—its form has merely become more fluid in that today banks use the symbol to represent the commodity: gold. Instead of specie a bank now deals in credit of one sort or another, whether it be the credit of a government as evidenced by the government's promise to pay or the credit of an individual as evidenced by an individual's check. Whether specie or credit, the thing dealt in is the current medium of exchange.

In *Osborne v. Bank of the United States*, 9 Wheat 738, at 860, 861, this court stated that banks were in trade from time immemorial, the original banking business being trade in specie. In *Gibbons v. Ogden*, 9 Wheat 1, at 229, 230, this court stated:

“Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, and various mediums of exchange become commodities and enter into commerce.”

So the dealing of a bank in mediums of exchange, a dealing which is the very soul of the banking business, is commerce.

The ingress and egress of persons has been held to be commerce. *Passenger cases*, 7 Howard, 283, *Head Money cases*, 112 U. S. 580; *Ekeii v. U. S.*, 142 U. S. 651. That

the ingress or egress of goods including precious metals is commerce goes without saying.

A bank may be said to deal not only in the medium of exchange but, to use an economic word of art, the "place utility" of cash. Through the bank, its customer without the actual transmission of specie can pay a bill in Chicago, while his only credits are in New York. The bank provides its customers with "place utility". A bank deals in the transportation of funds as a railroad deals in the transportation of commodities. A bank like a railroad is an instrumentality of commerce.

Commerce itself is a two way road. On one side manufactured goods go from producer to consumer; on the other, credits go from consumer to producer. If either side of the road is obstructed commerce ceases. There can no more be commerce without payment than there can be commerce without the manufacture or production of goods. If the manufacturer produces the goods which come up one side of the road to the consumer, the bank supplies the goods which go down the other side of the road from the consumer to the producer.

The defendant is no different than any other commercial bank except insofar as its commercial importance is greater due to its size. The defendant bank had resources in 1938 of substantially over one-half billion dollars (pp. 5-6, fols. 15-17). Its commercial importance was such, that it was impelled to do business in a building which, with the land on which it was situated, was assessed by the City of New York for six and a half million dollars (p. 2, fol. 6); a building situated in the heart of what has become and was in 1938 the world's financial center (p. 2, fol. 6); a location which cost the bank a rental which must have been approximately a half million a year, a figure arrived at by taking interest at 6% on the value placed upon it by the bank in its financial state-

ments and adding to it the deficit arrived at from the operation of the building (p. 3, fol. 7). The defendant bank has customers in every sort of business for whom it does a general commercial banking business. Thus for these customers engaged in interstate and foreign commerce it does precisely those things which have just been shown to be part and parcel of commerce itself.

The decisions of this court in cases such as *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1; *Associated Press v. Labor Board*, 301 U. S. 103, and *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, are here in point. In this connection also the defendant's membership in the New York Clearing House and the Federal Reserve System is important (p. 9, fol. 25). Thus it appears that the defendant is more than facilitating commerce; its business, banking, is commerce.

B. The Defendant Was Engaged in Interstate Commerce.

If banking is a commerce, this defendant's banking was interstate commerce. The defendant undertakes transactions for exchange and maintains deposits in other banks, or at least has funds coming from other banks as shown by its annual statement (pp. 5-8, 11, fols. 15-23, 32, 33). For example, in 1938, the defendant's annual statement shows as due from banks the sum of almost \$4,000,000.00 (pp. 5-8, fols. 15-23). The actual shipments of gold to and from the United States in normal times was unquestionably affected by the foreign exchange business undertaken by this defendant at the request and in the interest of its customers.

In *Western Union v. Texas*, 105 U. S. 460, it was claimed that the transmission of messages between the states was

not interstate commerce. This court held in substance that a telegraph company occupies the same relation to commerce as a carrier of messages as a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their business in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any extent in commercial pursuits. Can less be said of the defendant bank? For the transmission of money is more directly connected with commerce than the transmission of intelligence. The transmission of intelligence is an aid to business. The transmission of money is business itself.

C. The Defendant Was Engaged in the Production of Goods for Commerce.

As before pointed out the defendant prepares cashier's checks, credit reports and so forth (pp. 11, 14, fols. 33, 40, 41). The word "goods" as used in the act is defined in Section 3(i) as:

"'Goods' means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Produced is defined in Section 3(j) as follows:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have engaged in the production

of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Thus, the defendant directly produced certain goods for commerce, and indirectly is engaged in production within the Act in that it transports specie and renders its customers an equivalent service in providing for them a "place utility" of cash. In a sense then, a bank's whole business is production in commerce as that term is defined in the Fair Labor Standards Act.

The bank in furnishing credit information, transmitting intelligence across State lines, financing the sale and purchase of goods to and from other States, sending out and receiving drafts with bills of lading attached etc., engage in activities involving the physical distribution of goods in interstate commerce and therefore production in commerce. Plaintiff bears the same relation thereto that employees in *Kirschbaum v. Walling*, 316 U. S. 517, bore to the production of goods for commerce carried on in that building.

The Administrator of the Wage and Hour Division, so specifically urged before the Court of Appeals of the State of New York, that the defendant was engaged in production was a major part of the first point of the brief of the Administrator submitted as *amicus curiae* to the Court of Appeals. That point was "*Plaintiff was engaged in commerce and/or the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938*".

The foregoing distinguishes the instant case from those involving office buildings, as to which this court recently

denied certiorari. *Tommy Johnson v. Dallas Downtown Development Co.* Certiorari denied April 19th, 1943. No official citation.

There are presently pending three cases in which the facts are or may be on all fours with those in the instant case. Those cases are *Lofther v. First National Bank of Chicago*, 48 F. Supp. 692 (6 Labor Cases, par. 1659). *Lorenzetti v. American Trust Company*, 45 F. Supp. 128 (6 Wage and Hour Cases 269). *Johnson v. Hamilton National Bank*, (6 Labor Cases, par. 281). Of these cases only the decision in the *Lofther* case agrees with that of the Court of Appeals in the instant case. In the *Lofther* case, so far as the decision goes, there was no evidence that the employees involved performed any services in the private banking quarters of the bank. The District Court, referring to the services performed by the employees, said:

"They operate the elevators and clean and patrol in the halls and offices in an office building in downtown Chicago."

In *Lorenzetti v. American Trust Company*, the identical question here presented was decided in favor of the plaintiff. In *Johnson v. Hamilton National Bank*, the Tennessee Chancery Court overruled a demurrer to a complaint involving so far as the decision goes facts identical with those in the instant case.

If the defendant, as is apparently the case, is engaged in production, the instant decision is contrary to the decisions of this Court in *Kirschbaum v. Walling*, 316 U. S. 517, and *Arsenal Building Corporation v. Walling*, 316 U. S. 517.

POINT II.

Plaintiff's work was so closely connected with the interstate activities of the defendant as to be a part thereof within the meaning of the Fair Labor Standards Act.

This court indicated in the majority decision in *McLeod v. Threlkeld* (Decision handed down June 7th, 1943. No official report yet) that it would not hold decisions under the Federal Employers Liability Act completely applicable under the Fair Labor Standards Act, or else reversed certain extreme decisions under the Federal Employers Liability Act.

Nevertheless, decisions under that statute which are not extreme, which pass on the question of closeness to interstate commerce and which seem to cover much the same points, should be helpful. The Appellate Division held that—

“Plaintiff's employment bore a sufficiently close relation to defendant's banking business to justify the holding that he was engaged in commerce within the meaning of the Act” (p. 36, fol. 107).

In so holding, the lower court was amply sustained by the authority of decisions of this court under the Federal Employers Liability Act.

Decisions under the latter Act can be analyzed, and the broader rules thereunder as set forth by this court, can be stated. For this purpose the factual situations involved can be divided into three types: (a) movables, (b) supplies, and (c) plant. As to the movables and supplies we are not here concerned, except so far as the

general run of cases thereon would sustain the decision of this court in the *Threlkeld* case. Plant cases cover situations involving the repair or maintenance of fixed equipment used at least in part in interstate commerce, such as repairs to bridges used in part in interstate commerce; cleaning tracks used in part in interstate commerce of wreckage; cleaning tracks or yards so used of weeds or rubbish, changing ties and so forth. This court held in *Pederson v. Delaware, L. & W. R. R.*, 299 U. S. 146, that an employee injured while repairing a bridge used both in intra and interstate commerce was covered by the Federal Employers Liability Act.

In *Pederson v. Fitzgerald Construction Co.*, 63 Sup. Ct. 558, this court held the Fair Labor Standards Act equally applicable to the same work.

In *Plass v. Central New England Ry. Co.*, 242 U. S. 353, this court held that an employee injured while cleaning tracks or yards used in interstate commerce was covered by the Federal Employers Liability Act. There would seem to be little question that were the same question to arise under the Fair Labor Standards Act the employee should be found to be covered.

The railroad tracks and the freight yards are equivalent to the private portions of the bank. There the cashiers and tellers prepare for transmittal in interstate commerce and start on their way the instruments for the transmission of funds with which they deal, just as in the freight yards, the railroad employees start the freight car on its way in interstate commerce. The clerk of a bank in banking quarters deals in actual interstate commerce while in process of transmission, just as does the engineer of a locomotive.

There is a distinction between the public and private portions of the banking premises, that is neither nebulous

or far-fetched, for it appears in the stipulation of facts on which this action is based. At page 16, folio 47, the stipulation reads:

"Inasmuch as maintenance and operation employees are not bonded, they are not permitted during banking hours to enter any part of the banking quarters other than the space opened to the public, unless accompanied by the bank guard. During other than banking hours they are under the general surveillance of a bank guard, when working in parts of the banking quarters other than those open to the general public."

The position of the plaintiff in the instant case is in all respects analogous to that of the employee in such cases as *Plass v. Central New England Ry. Co., supra*. In both the cleaning is necessary maintenance work on an instrumentality of commerce which may aid on its way, either interstate or intrastate commerce without distinction.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction; and that to such an end a writ of certiorari should issue to the Supreme Court of the State of New York.

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